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Summary record of the 877th meeting
Held at Headquarters, New York, on Tuesday, 24 June 2008, at 10 a.m.

Chairperson: Mr. Illescas ..... (Spain)

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Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

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08-39723 (E)

The meeting was called to order at 10.20 a.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Adds.1-13; A/CN.9/XLI/CRP.3 and 6)

Draft article 87 (Passengers and luggage)

1. **Ms. Marcovčić Kostelac** (Observer for Croatia) noted that the Spanish version of the title of the draft article spoke of "Passengers and their luggage" ("Pasajeros y su equipaje"), in contrast with "Passengers and luggage" in the English version. She proposed the insertion of the possessive pronoun in the English version, in the interests of concordance and in line with the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea.

2. **The Chairperson** said that the drafting group would address the matter.

3. *Draft article 87 was approved in substance and referred to the drafting group.*

Draft article 88 (Damage caused by nuclear incident)

4. **Mr. Sato** (Japan), pointing out that the Paris Convention on Third Party Liability in the Field of Nuclear Energy had been revised in 2004, asked for the Secretariat to check the current status of all the nuclear conventions mentioned in the draft article, so as to ensure fully up-to-date references.

5. **The Chairperson** said that the Secretariat would carry out such a check and that all appropriate changes would be made.

6. *Draft article 88 was approved in substance and referred to the drafting group.*

Draft article 89 (Depositary)

7. *Draft article 89 was approved in substance and referred to the drafting group.*

Draft article 90 (Signature, ratification, acceptance, approval or accession)

8. **The Chairperson** said that the spaces between square brackets would be filled once the place and dates of signature had been agreed upon.

9. **Mr. de Boer** (Observer for the Netherlands) called attention to a letter from the Minister of Transport, Public Works and Water Management of the Netherlands, the Mayor of Rotterdam and the Executive Board of the Port of Rotterdam Authority addressed to all delegations to the forty-first session of the Commission (A/CN.9/XLI/CRP.3, annex). He said that, because of the great value attached by the Netherlands authorities to the work of the Commission and in recognition of the achievement represented by the finalization of the draft convention, which would be the culmination of six years of hard work, they would consider it a great honour to organize and host in Rotterdam an event to celebrate its adoption, including a signing ceremony, if the United Nations General Assembly approved. In keeping with the maritime nature of the draft convention, a large part of the celebration would take place on an ocean passenger steamer.

10. **Ms. Carlson** (United States of America), **Mr. Morán Bovio** (Spain), **Mr. Sharma** (India), **Mr. Mollmann** (Observer for Denmark), **Mr. Honka** (Observer for Finland), **Mr. Mbiah** (Observer for Ghana), **Ms. Talbot** (Observer for New Zealand), **Mr. Berlingieri** (Italy), **Mr.** Ibrahima Khalil **Diallo** (Senegal), **Mr. Gombrii** (Norway), **Mr. Elsayed** (Egypt), **Mr. Essigone** (Gabon), **Mr. Blake-Lawson** (United Kingdom), **Mr. Sandoval** (Chile), **Ms. Downing** (Australia), **Mr. Imorou** (Benin), **Ms. Halde** (Canada), **Mr. Lebedev** (Russian Federation), **Ms. Shall-Homa** (Nigeria), **Mr. Sato** (Japan), **Mr. Luvambano** (Observer for Angola), **Ms. Traoré** (Observer for Burkina Faso), **Mr. Bokama Olenkongo** (Observer for the Democratic Republic of the Congo), **Mr. Moulopo** (Observer for the Congo), **Mr. Schelin** (Observer for Sweden), **Ms. Sobekwa** (South Africa), **Mr. M'inoti** (Kenya), **Mr. Oyarzábal** (Observer for Argentina), **Mr. Bigot** (Observer for Côte d'Ivoire) and **Ms. Marcovčić Kostelac** (Observer for Croatia) expressed deep appreciation for the leading role played by the Netherlands in the development of the draft convention and welcomed the generous offer by the authorities of that country to organize an event to celebrate its finalization and adoption. They looked forward to accepting the invitation, upon its being approved by the General Assembly.

11. **Mr. Sekolec** (Secretary of the Commission) said that Commission might wish to reflect in the text of the

draft convention itself the participants' broad recognition of Rotterdam as the most suitable place for the signing ceremony. Accordingly, the name "Rotterdam" could be inserted in draft article 90, paragraph 1, as the place at which the finalized convention would initially be open for signature. The period during which the instrument would be open to signature, first in Rotterdam and then at Headquarters, would be specified upon finalization, in late 2008 or early 2009.

12. **The Chairperson** said that it was the first time in the six years of preparing the draft convention that he had seen such a unanimous agreement to a suggestion put forward by a participant. He proposed the removal of the first set of square brackets in paragraph 1, before "at" and after "thereafter" and the insertion in the first space, in place of the dotted line and without square brackets, of the name "Rotterdam".

13. *Draft article 90, as amended, was approved in substance and referred to the drafting group.*

Draft article 91. Denunciation of other conventions

14. *Draft article 91 was approved in substance and referred to the drafting group.*

Draft article 92. Reservations

15. **The Chairman** drew attention to the proposed amendment to draft article 92 put forward by the delegations of Austria and Germany and set out in document A/CN.9/XLI/CRP.6.

16. **Ms. Czerwenka** (Germany), introducing the proposal, recalled that, throughout the negotiations, her delegation had expressed a number of concerns regarding the regulation of multimodal transport contracts as defined in the draft convention. First, the draft failed to address various specific problems relating to carriage performed partially by land, inland waterway or air. The list of exemptions in draft article 18, paragraph 3, had been drawn up with only maritime transport in mind. For instance, it was inconsistent to relieve the carrier of liability in cases of fire on the ship in draft article 18, paragraph 1 (f) but not in cases of fire affecting other vehicles. Furthermore, draft article 82 on volume contracts in conjunction with the definition of "volume contract" did not address situations in which the contract of carriage provided for a series of shipments by road but only a single shipment by sea.

17. Second, there was no justification for applying the maritime regime set out in the draft convention in cases where the land leg was considerably longer than the maritime leg. In particular, it was difficult to understand why, when compared with the provisions of other instruments, including the Convention on the Contract for the International Carriage of Goods by Road (CMR) and the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM-COTIF), the draft convention provided for significantly diminished carrier liability in such cases.

18. Third, when determining the applicability of draft article 27, the text placed an unfair burden of proof on the shipper, who would usually be unable to prove where the damage had occurred and would thus be unable to rely on draft article 27 for the purposes of compensation.

19. Fourth, the draft convention discriminated against the shipper as compared to the carrier in cases where another international convention provided for a shorter period of time for suit. If, pursuant to draft article 64, the shipper instituted a claim more than one year after the breach of obligation but before the expiry of the two-year period provided for in that article, such a claim could be dismissed if the carrier was able to prove, for example, that the damage had occurred during the land leg covered by the provisions of CMR, since, pursuant to the latter, the period of time for suit was only one year.

20. Fifth, the absence of a rule allowing the claimant to take direct action against the carrier performing carriage by road or rail was problematic. It was even more problematic to leave unresolved the issue of whether, by virtue of draft article 12, paragraph 3, the carrier could restrict the period of responsibility to the tackle-to-tackle period and thus, on the basis of draft article 20, paragraph 1, exempt itself and the maritime performing party from any liability for damages occurring on land.

21. Sixth, there was no justification for not allowing parties to a maritime plus contract to opt out of the network system provided for in draft article 27 and to agree on the application of a single liability regime.

22. Seventh, the draft convention led to a fragmentation of the laws on multimodal transport contracts because it applied only to one part of those contracts. In her view, it was unreasonable to exclude, by virtue of draft article 84, any modernization of

unimodal conventions and, in addition, to prevent the adoption of an international regime regulating not only maritime plus contracts but also full-fledged multimodal transport contracts.

23. Since the Commission had already approved most of the draft text, it was no longer possible to remedy the aforementioned shortcomings. Thus, the German and Austrian delegations had proposed redrafting the reservations clause in such a way as to allow contracting States to reserve the right not to apply the convention to maritime plus contracts. States that shared her delegation's concerns would thus be in a position to ratify the convention and introduce a new maritime regime. In the absence of a reservations clause, States with concerns about the multimodal regulations might not ratify the instrument. Furthermore, the reservations clause was discretionary, not mandatory, and did not preclude the possibility of adopting a comprehensive set of uniform rules on genuine multimodal transport contracts at the international level.

24. **Mr. Barbuk** (Belarus) expressed support for the statement by the representative of Germany. While the draft convention dealt primarily with carriage by sea, some States were completely landlocked. The proposed new version of draft article 92 would ensure that the instrument was of interest to those States.

25. **Ms. Carlson** (United States of America) said that her delegation was strongly opposed to the proposal put forward by Austria and Germany. Indeed, should that proposal be approved, the United States would have very little interest in becoming a party to the convention. The door-to-door (or maritime plus) scope of the instrument was essential. Specifically excluding the application of the convention to contracts providing for carriage by sea and by other modes of transport in addition to sea carriage would undermine its fundamental purpose. Furthermore, acceptance of the maritime plus nature of the convention was an integral part of the compromise package agreed upon by over 30 States at the twenty-first session of Working Group III (Transport Law) (A/CN.9/WG.III/XXI/CRP.5). Her delegation could not approve the proposal put forward by Austria and Germany without violating that agreement.

26. **Mr. Mollmann** (Observer for Denmark) said that, like the representative of the United States, he was neither willing nor able to support the Austrian and German proposal. The Commission had devoted six years to developing a set of binding rules that responded to modern transport needs and established a uniform and predictable regime at the global level. The proposed amendment would drastically alter the scope of those rules by allowing contracting States to restrict their application to port-to-port contracts. National law would thus govern the land legs of any multimodal transport contracts, a situation that undermined the Commission's desire for uniformity. In addition, the proposed new wording of draft article 92 ran counter to the compromise solution reached in the Working Group.

27. **Mr. Morán Bovio** (Spain) stressed that there was a need for consistency in the Commission's decisions. The representative of Germany had enumerated a number of flaws in the draft convention, but her comments reflected only her delegation's perspective, not the perspective of the Commission as a whole. The Working Group had been mandated to draft a legislative instrument covering multimodal transport. The proposal put forward by Austria and Germany undermined that mandate and, if approved, would divest the draft convention of its door-to-door scope and run counter to the work done so far. His delegation therefore favoured retaining the current text of draft article 92.

28. **Mr. Lebedev** (Russian Federation) said that he welcomed the opportunity to revisit the issue of the scope of the draft convention and trusted that the points raised by the representative of Germany would be reflected in the record of the meeting and taken into consideration in the context of any future discussions on the question of reservations. With a view to determining the consequences of the amendment to draft article 92 proposed by Austria and Germany, he recalled that, upon ratifying the convention, States would automatically denounce the Hague-Visby and Hamburg Rules. However, if contracting States then reserved the right to exclude the application of the convention to maritime plus contracts, it appeared that situations in which goods were lost during the maritime leg of a multimodal transport contract would remain unregulated by international law. He would be grateful for further clarification in that regard.

29. **Mr. Blake-Lawson** (United Kingdom) said that the proposal of Austria and Germany would be costly in terms of uniformity; he urged delegations wishing to introduce the possibility of reservations to the

convention to be willing to compromise on other draft articles. The draft convention was perhaps too detailed, but useful ambiguities in the text permitted a certain flexibility in its application. Draft article 2 on interpretation of the convention required States to be faithful to its spirit, but allowed ample scope for domestic law or judicial determination to fill in any gaps or ambiguities. Though the possibility of reservations might make it more palatable to his delegation in view of its concerns about chapters 9 and 12, but it regarded, the text as drafted as very workable. Certainly, no reservation should be permitted that would compromise the delicate balance between cargo and carrier interests reflected in the text. Delegations should have faith in the work they had done on the draft convention and stand by what had been agreed previously; he urged the retention of draft article 92.

30. **Mr. Tsantzalos** (Greece) said that he did not support the proposal by Austria and Germany. Shipping was a national commercial activity that required international rules, and the best way to get results was through an international convention. A reservation clause opened the door to regulatory arrangements that would lead towards a fragmented system and away from uniformity and clarity. After six years of work, that proposal undermined the purpose of the draft convention.

31. **Ms. Halde** (Canada) said that her delegation supported the proposal, which was a final attempt at introducing needed flexibility into the text, leading to a higher number of ratifications.

32. **Mr. Schelin** (Observer for Sweden) said that he was worried that some of the major trading countries had raised concerns regarding multimodal transport and limitation levels. Uniformity was indeed important, but it would not have much value if only a few States were able to ratify the convention. In the worst-case scenario, the convention might enter into force alongside the Hague-Visby and Hamburg Rules, resulting in three or even four systems being applied simultaneously. He urged a compromise in order to broaden the consensus.

33. **Ms. Downing** (Australia) said that she agreed with the United States delegation that door-to-door scope was important, but that aim had not been achieved. Her delegation, too, had hoped for uniformity in the system, which the current instrument did not provide. It had already shared a number of its concerns, especially regarding draft article 27 and draft article 12, paragraph 3, and thus supported the proposal by Austria and Germany.

34. **Mr. Maradiaga** (Honduras) said that the draft convention was in line with the purpose of the Commission, which was the harmonization of international trade law. Allowing reservations would undermine the work done by the Working Group; his delegation therefore did not support the proposal.

35. **Mr. Delebecque** (France) said that the proposal would allow States to set aside the convention, even for the maritime segment, if it had a multimodal component. The proposal could cover any liner transport, and in his view it went too far. There might be a need to consider a multimodal transport regime in a regional context, but the proposal as drafted contained a high risk of fragmentation of law.

36. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that his delegation had been sceptical about the draft convention, but found that draft article 92 in its current form was fully acceptable. It represented a compromise and ensured that the convention would be broad in scope.

The meeting was suspended at 11.50 a.m. and resumed at 12.10 p.m.

37. **Mr. van der Ziel** (Observer for the Netherlands) said that, in the view of his delegation, the proposal on reservations in respect of maritime plus contracts went too far. In general, modern contracts, particularly in the container trade, were multimodal; regulating port-to-port contracts no longer made sense. Some concessions had been made: for example, a distinction had been drawn between maritime performing parties and inland performing parties without providing for direct action against an inland performing party. He agreed with the observer for Sweden that it would be important to enable the major trading countries to adhere to the convention, but excluding the whole multimodal aspect through a reservation clause went too far.

38. **Mr. Sato** (Japan) said that he was sympathetic to the need for adjustment regarding multimodal transport, but the proposal went too far by excluding multimodal transport as a whole without any conditions. States could refuse to apply the convention regardless of whether any other regimes applied. The proposal represented extreme pre-emption of rights,

which his delegation could not support. It was not opposed to some adjustment, but hoped for a more limited and reasonable approach.

39. **Mr. Berlingieri** (Italy) said that, from the outset his delegation had advocated for a modern door-to-door instrument that would be more suited to the age of container shipping. To allow the proposed reservations would undermine uniformity. His delegation was never opposed to negotiation, but after six years, it was time to come to a conclusion and adopt the current text of draft article 92.

40. **Mr. Sandoval** (Chile) said that his delegation rejected the proposal and favoured the current text of the draft article.

41. **Mr. Gombrii** (Norway) said that his delegation could not agree to the proposal for both substantive and procedural reasons, having joined the compromise in the Working Group. He agreed with the representative of Sweden that it was a problem when major trading nations felt that they could not sign the convention, but perhaps that was an indication that compromise was needed on limitation of liability. For example, the limits under draft article 61 could be maintained, but with a phase-in period, which might then allow States to ratify the Convention.

42. **Mr. Orfanos** (Observer for Cyprus) said that his delegation did not support the proposal for the reasons stated by the delegations of Greece, the United States, Spain and Denmark.

43. **Ms. Czerwenka** (Germany) argued that it was common for delegations to make provision for reservations to a convention at the end of negotiations, in order to address their concerns with some part of the instrument. Other conventions, such as the United Nations Convention on Contracts for the International Sale of Goods, allowed for rather broad reservations. The reservation clause proposed by the African States in their written comments (A/CN.9/658/Add.1, para. 24) was not framed in terms of contracts. In contrast, the Austrian and German proposal did refer to one of the two specific types of contracts, as described in draft article 1, paragraph 1, that were regulated by the convention. The proposed reservation clause would only apply to multimodal contracts; States that had ratified the convention would still be required to apply it to contracts that provided for carriage by sea only.

44. Currently, if a multimodal transport contract included a maritime leg, it might still be necessary under the applicable law to apply the Hague Rules, for instance to the maritime leg. If a State ratified the convention and denounced the Hague Rules, it would then apply the maritime regime provided for in the convention to the maritime leg of a multimodal contract. In that regard, the current situation would not change.

45. Although it was not possible under the draft convention, it should be possible — and would indeed be advantageous — for parties to be able to apply a single, uniform liability regime to multimodal transport contracts, without having to prove where damage to the goods had occurred; the burden of proof might be difficult and costly for the shipper.

46. **Mr. Honka** (Observer for Finland) said that his delegation had framework instructions from his Government, which had welcomed the Commission's efforts to deal with multimodal aspects. However, draft article 27 in its current form was too uncompromising, because it did not provide for the possibility of applying national mandatory law. Since his delegation was not completely happy with draft article 27, which had already been approved, it would like to allow States some room for manoeuvre, which might lead to broader ratification of the convention. His delegation thought that further compromise remained possible and would be prepared to discuss the reservation clause proposed by the delegations of Austria and Germany, though its scope would have to be restricted.

47. **Ms. Shall-Homa** (Nigeria) said that her delegation had some sympathy for the Austrian and German proposal. By concentrating on agreed basic rules and allowing disagreement on certain other matters, a reservation clause provided a means of encouraging harmony among States with widely differing social, economic and political systems. However, such a clause should not call into question the integrity of the draft convention, which had been the product of significant efforts and compromises.

48. Her delegation had had serious reservations on several articles, most notably draft article 14. It had hoped that draft article 14 would be based on the principle of due diligence, both before the voyage and throughout it to the point of final delivery, in the light of the obligations placed on shipowners, as a result of the International Safety Management (ISM) code and

other laws affecting shipping. It had also hoped that draft article 14 would eliminate the defence based on nautical fault, or exceptions for acts, neglect or default in navigation or management of ships, frequently invoked by carriers. Draft article 14, paragraph 2, also permitted contractual allocation of responsibility for certain functions, such as loading, handling, stowing and discharging, to the shipper and the consignee. Given the lack of sophisticated discharge and loading equipment in the African trade, it was clear that allowing carriers to contract out of responsibilities for certain functions created a complex set of liabilities in a localized manner, and would not lead to the uniformity and harmonization that the convention sought to achieve. Nevertheless, she remained hopeful that a compromise might be reached.

49. **Mr. Serrano Martínez** (Colombia) said that the proposed reservation clause would sacrifice the scope of contractual freedom embodied in the draft convention and undermine uniformity by introducing substantial changes. Draft article 92 was the product of intense debate in the Working Group; the time had come to move forward. His delegation therefore supported the retention of article 92 in its current form.

50. **Ms. Talbot** (Observer for New Zealand) said that her delegation, along with a probable majority of delegations in attendance at the current session, had not been a party to the compromise that had been reached at the twenty-first session of the Working Group. It shared the concerns that had been voiced regarding the draft convention and had sympathy with the suggestion made by the representative of Sweden that a compromise should be reached. The prospect of three parallel legal regimes — the Hague-Visby Rules, the Hamburg Rules and the current convention — operating concurrently, to the detriment of the Commission's goal of uniformity, was also a matter of concern. Her delegation had entered the negotiation process seeking uniform rules for international transport door-to-door, and like the delegation of Australia, she considered that that goal had not been satisfactorily achieved. Although the proposed reservation clause did not resolve the problem for her delegation, she remained open to seeking a different solution to the outstanding problems.

51. **Mr. Elsayed** (Egypt) said that the door should not be opened to reservations. His delegation supported further compromise with the aim of improving upon the draft convention; that, in turn, would address the concerns raised by the delegations of Austria and Germany and at the same time make it possible to implement the convention, which had been the product of extensive efforts. The delegation of Germany had indeed raised an issue of particular relevance, given the rise in multimodal transport and its impact on maritime transport.

52. **Mr. Sharma** (India) said that the proposed reservation clause was clearly related to the scope of application of the draft convention. Early in the negotiations, the character of the draft convention — whether it should be multimodal, door-to-door or restricted to the sea voyage — had been the subject of debate. The final decision had resulted in a door-to-door, maritime plus convention that was not truly multimodal in character. The reservation clause provided for opting out of the convention as a whole with regard to multimodal contracts and therefore changed the maritime plus character of the instrument.

53. Another issue highlighted by the delegation of Germany was the applicability of the regime to the land leg of the transport contract. The problem had been solved to a great extent, with regard to the application of international instruments, where applicable, when such instruments were available in regional forms such as CMR. Since the beginning of negotiations his delegation and several others had been pointing out that there was a gap for non-CMR countries. The proposal also addressed that issue indirectly.

54. He agreed with most delegations that, following extensive discussions, a delicate balance had already been reached on draft article 27. However, as minor problems remained, his delegation was open to further discussion of a solution, including a reservation clause, but opposed reservations to the convention as a whole.

55. **Ms. Sobekwa** (South Africa) said that her delegation could not support the proposal made by the representatives of Austria and Germany because it would severely undermine the convention or destroy its value as a means of promoting uniformity. The current text of draft article 92 should be retained.

56. **Mr. Mbiah** (Observer for Ghana) said that his delegation also associated itself with the comments of the observer for Sweden regarding the importance of producing a convention that could be implemented. The draft convention's key elements of uniformity, modernization and balance of interests had been

maintained, despite the delicate compromises made, and had in fact served as the basis for those compromises. At some of the Working Group's deliberations, the choice of a uniform liability approach versus a network liability approach had been debated extensively. While a uniform approach had been favoured, the impossibility of achieving it had led to the adoption of a mixed approach, built upon a whole series of decisions taken over a long period of time.

57. Although his delegation, like others, had problems with certain draft articles, it should be borne in mind that parties to a compromise never left the negotiating table entirely satisfied, but that all involved hopefully gained something in the process. The Commission had come to accept the maritime plus regime with all its limitations, and after six years of negotiations, it was too late to seek further compromises, which would undoubtedly require another lengthy process. Draft article 92 in its current form was important; if parties were allowed to make selective use of the provisions of the convention, that would undermine the basis of the instrument and be inconsistent with its very title.

58. **Ms. Markovčić Kostelac** (Observer for Croatia) said that although it was true that reservation clauses were usually negotiated in the later stages of the finalization of a convention, the adoption of the proposal made by the delegations of Austria and Germany, at such a late stage in the process, would constitute a radical approach. Many compromises had been made during nearly six years of negotiation. No one involved was likely to be entirely satisfied with the compromises reached, but all could agree that some of their views and approaches had been taken into account. Both the carriage and shipping industries in her country were modest ones, and for that reason, her Government was keenly interested in having international rules. Accepting the proposed amendments to draft article 92 would result in an international instrument that had been ratified by many countries but was implemented on a very limited scale, and that, in turn, would not lead to the harmonization to which the Commission aspired. However, her delegation remained open to further discussion and possible compromises, provided that they did not deviate from the main principles of the draft convention.

59. **Mr. Hu** Zhengliang (China) welcomed the proposal made by the delegation of Sweden and said that compromise was necessary in order to achieve real legal uniformity.

60. **Mr. Bigot** (Observer for Côte d'Ivoire) said that his delegation supported the retention of draft article 92 in its current form for the reasons cited by the United States delegation and others, and in the light of the compromise achieved in the Working Group. Further compromise on draft article 92 would jeopardize the delicate balance achieved on a number of provisions in the draft convention.

The meeting rose at 1 p.m.